DATE FILED: December 04, 2023 3:53 PM

SUPREME COURT STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80202	
Original Proceeding District Court, City and County of Denver, Colorado, Case No. 2023CV32577	
Petitioner-Appellants/Cross-Appellees: **NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT,** and **CHRISTOPHER CASTILIAN**, v. **Respondent-Appellee:** **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, v. **Intervenor-Appellee:** **COLORADO REPUBLICAN STATE CENTRAL COMMITTEE,** an unincorporated association, **Intervenor Appellee/Cross-Appellant:** **DONALD J. TRUMP.s-Appellee:** and **DONALD J. TRUMP.**	▲ **COURT USE ONLY** ▲
Attorneys for Intervenor-Appellant/Cross-Appellee, Donald J. Trump: Scott E. Gessler (28944), sgessler@gesslerblue.com Geoffrey N. Blue (32684) gblue@gesslerblue.com GESSLER BLUE LLC 7350 E Progress Pl., Suite 100 Greenwood Village, CO 80111 Tel: (720) 839-6637 or (303) 906-1050	Supreme Court Case Number: 2023SA00300

INTERVENOR-APPELLEE/CROSS-APPELLANT, DONALD J. TRUMP'S INDEX OF ATTACHMENTS TO HIS REPLY BRIEF

Intervenor-Appellee/Cross-Appellant Donald J. Trump ("President Trump") submits the following attachments to his Reply Brief and in addition to the exhibits filed by the other parties:

Attachment No.	**Description**
1	Omnibus Ruling on Pending Dispositive Motions, October 20, 2023
2	Petition for Rule to Show Cause Pursuant to C.A.R. 21, *Frazier v. Williams*, Case No. 2016SA230 (Colo. S.Ct. Aug. 9, 2016)

Respectfully submitted 4th day of December 2023,

GESSLER BLUE, LLC

By: s/ *Scott E. Gessler*
Scott E. Gessler

Attorney for Donald J. Trump

CERTIFICATE OF SERVICE

I certify that on this 4th day of December 2023, the foregoing was electronically served via e-mail or CCES on all counsel and parties of record.

Attorneys for Petitioners-Appellants/Cross-Appellees NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN:

Mario Nicolais, Atty. Reg. # 38589
KBN Law, LLC
7830 W. Alameda Ave., Suite 103-301
Lakewood, CO 80226
Phone: 720-773-1526
Email: mario@kbnlaw.com

Martha M. Tierney, Atty. Reg. # 27521
Tierney Lawrence Stiles LLC
225 E. 16th Ave., Suite 350
Denver, CO 80203
Phone: 303-356-4870
Email: mtierney@tls.legal

Eric Olson, Atty. Reg. # 36414
Sean Grimsley, Atty. Reg. # 36422
Jason Murray, Atty. Reg. # 43652
Olson Grimsley Kawanabe Hinchcliff & Murray LLC 700 17th Street, Suite 1600
Denver, CO 80202
Phone: 303-535-9151
Email: eolson@olsongrimsley.com
Email: sgrimsley@olsongrimsley.com
Email: jmurray@olsongrimsley.com

Donald Sherman* Nikhel Sus* Jonathan Maier*
Citizens for Responsibility and Ethics in Washington 1331 F Street NW, Suite 900
Washington, DC 20004
Phone: 202-408-5565
Email: dsherman@citizensforethics.org
Email: nsus@citizensforethics.org Email: jmaier@citizensforethics.org

Attorneys for Respondent-Appellee Secretary of State Jena Griswold in her official capacity as Colorado Secretary of State:

Michael T. Kotlarczyk
Grant T. Sullivan
LeeAnn Morrill
Colorado Attorney General's Office
mike.kotlarczyk@coag.gov
grant.sullivan@coag.gov

leeann.morrill@coag.gov

Attorneys for Intervenor-Appellee Colorado Republican State Central Committee:
Michael William Melito
Melito Law LLC
melito@melitolaw.com

Robert Alan Kitsmiller
Podoll & Podoll, P.C.
bob@podoll.net

Benjamin Sisney
Nathan J. Moelker
Jordan A. Sekulow
Jay Alan Sekulow
Jane Raskin
Stuart J. Roth
American Center for Law and Justice
bsisney@aclj.org
nmoelker@aclj.org
jordansekulow@aclj.org
sekulow@aclj.org
Andrew J. Ekonomou
aekonomou@outlook.com

By: *s/ Joanna Bila*
Joanna Bila, Paralegal

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202	
Petitioners: NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and CHRISTOPHER CASTILIAN **v.** **Respondents:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State, and DONALD J. TRUMP **and** **Intervenors:** COLORADO REPUBLICAN STATE CENTRAL COMMITTEE and DONALD J. TRUMP	**Δ COURT USE ONLY Δ** Case No.: 2023CV32577 Division: 209

OMNIBUS RULING ON PENDING DISPOSITIVE MOTIONS

This matter comes before the Court on Donald J. Trump's Motion to Dismiss, filed September 22, 2023; Colorado Republican State Central Committee's Motion to Dismiss Pursuant to Colorado Rule of Civil Procedure 12(b)(5), filed September 22, 2023; Petitioners' Motion to Dismiss Intervenor's First Claim for Relief under C.R.C.P. 12(b)(1), filed September 22, 2023; and Colorado Republican State Central Committee's Motion for Judgment on the Pleadings Under Rule 12/Judgment as a Matter of Law

Under Rule 56, filed September 29, 2023. Having considered the parties' briefing, the relevant legal authorities cited, and being otherwise familiar with the record in this case, the Court FINDS and ORDERS as follows:

I. PROCEDURAL BACKGROUND

1. On September 6, 2023, Petitioners filed their Verified Petition under C.R.S. §§ 1-4-1204, 1-1-113, 13-51-105 and C.R.C.P. 57(a). Petitioners alleged two claims for relief. First, they asserted a claim against Respondent Jena Griswold pursuant to C.R.S. § 1-4-1204 and § 1-1-113. Second, they requested declaratory relief against both Respondent Griswold and then-Respondent Donald J. Trump. The declaratory relief requested included a declaration that then-Respondent Trump was not constitutionally eligible for the office of the presidency.

2. On September 22, 2023, then-Respondent Trump filed a Special Motion to Dismiss Pursuant to C.R.S. § 13-20-1101(3)(a) ("Trump Anti-SLAPP Motion"). In that motion, then-Respondent Trump argued that "this lawsuit" is subject to Colorado's anti-SLAPP statute because Petitioners' claims all stem from protected speech or the refusal to speak, and that because the speech concerned election fraud and a hard-fought election, they are the epitome of public issues. Then-Respondent Trump further argued that Petitioners were unable to establish a reasonable likelihood of success on their claims. As a result, argued then-Respondent Trump, the Court must dismiss the claims.

3. Also on September 22, 2023, then-Respondent Trump separately moved to dismiss Petitioners' claims ("Trump Procedural Motion to Dismiss"). Specifically, Trump argued: (1) Petitioners may not litigate constitutional claims in a C.R.S. § 1-1-113

proceeding; (2) the C.R.S. § 1-4-1204 claim was not ripe; (3) C.R.S. § 1-4-1204 does not provide grounds to use the Fourteenth Amendment to bar candidates; and (4) there is no standing on the declaratory judgment claim because there is no particularized or concrete injury.

4. Also, on September 22, 2023, Intervenor Colorado Republican State Central Committee ("CRSCC") filed a Motion to Dismiss Pursuant to Colorado Rule of Civil Procedure 12(b)(5) ("CRSCC Motion to Dismiss"). In that motion, CRSCC argued: (1) the Petition infringes on CRSCC's first amendment rights; (2) Secretary Griswold's role in enforcing C.R.S. § 1-4-1204 is ministerial; and (3) the C.R.S. § 1-4-1204 claim is not ripe. The motion also previewed additional arguments that Intervenor Trump made in a subsequent motion to dismiss on whether the 14th Amendment can be used to keep Intervenor Trump off the ballot.

5. Finally, also on September 22, 2023, Petitioners moved to dismiss Intervenor's First Claim for relief ("Petitioners' Motion to Dismiss"). The Petitioners argued that the CRSCC's First Claim for Relief was inappropriate in a C.R.S. § 1-1-113 proceeding because it is a constitutional challenge to the election code.

6. On September 29, 2023, the Petitioners responded to then-Respondent Trump's Motion to Dismiss. In that Response, the Petitioners agreed to dismiss their declaratory judgment claim. The Court has since dismissed that claim.

7. On September 29, 2023, Intervenor Trump filed an additional motion to dismiss. This motion to dismiss addresses various constitutional arguments regarding why the Petitioners' Fourteenth Amendment arguments fail ("14th Amendment Motion

to Dismiss"). In that motion, Intervenor Trump argues: (1) this case presents a nonjusticiable political question; (2) Section 3 of the Fourteenth Amendment is not self-executing; (3) Congress has preempted states from judging presidential qualifications; (4) Section 3 does not apply to Intervenor Trump; (5) Petitioners fail to allege that Intervenor Trump "engaged" in an "insurrection"; and (6) this is an inconvenient forum under C.R.S. § 13-20-1004.

8. Finally, on September 29, 2023, CRSCC filed a motion for Judgment on the Pleadings under Rule 12/Judgment as a Matter of Law Under Rule 56 ("CRSCC Motion for Judgment"). This motion essentially argues that this Court should grant all the relief CRSCC requested in its Petition based on the Petition alone. This includes its requests that this Court declare: (1) the relief Petitioners' request is a violation of their First Amendment rights; (2) Respondent Griswold does not have authority to preclude the placement of Intervenor Trump on Colorado's ballot pursuant to the Fourteenth Amendment; and (3) only the CRSCC has the authority to determine who is on Colorado's ballot.

9. On October 11, 2023, the Court denied Intervenor Trump's anti-SLAPP Motion.

II. LEGAL STANDARD

A complaint must state a plausible claim for relief to survive a C.R.C.P. 12(b)(5) motion to dismiss. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). However, motions to dismiss are disfavored, and may be granted only when, assuming all the allegations of the complaint are true, and drawing all reasonable inferences in favor of the plaintiff, the

plaintiff would still not be entitled to any relief under any cognizable legal theory. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). Although a complaint need not contain detailed factual allegations, a plaintiff must identify the grounds on which he is entitled to relief, and cannot simply provide "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint is insufficient if it provides only bald assertions without further factual enhancement. *Id.* at 557.

Whether a claim is stated must be determined solely from the complaint. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). A court may consider only the facts alleged in the pleadings, as well as "documents attached as exhibits or incorporated by reference, and matters proper for judicial notice." *Denver Post*, 255 P.3d at 1088.

A motion to dismiss under C.R.C.P. 12(b)(1) challenges a court's subject matter jurisdiction and may be raised at any time in the proceeding. "Subject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment." *In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981). In determining whether a court has subject matter jurisdiction, reference must be made to the nature of the claim (the facts alleged) and the relief sought. *In re Water Rights of Columbine Ass'n*, 993 P.2d 483, 488 (Colo. 2000); *Currier v. Sutherland*, 215 P.3d 1155, 1160 (Colo. App. 2008).

Standing is a prerequisite to establishing subject matter jurisdiction that can be raised at any time during the proceedings and must be determined prior to a determination on the merits. *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). A plaintiff bears the burden of proving a court has subject matter jurisdiction when such jurisdiction is challenged, but a "court may consider evidence outside of the complaint when necessary to resolve the issue." *City of Boulder v. Pub. Serv. Co. of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999). If a plaintiff cannot establish the trial court has subject matter jurisdiction or the court has no power to hear the case, the court must dismiss the action. *See* C.R.C.P. 12(h)(3).

III. LEGAL FRAMEWORK

The Colorado Secretary of State is charged with the duty to "supervise the conduct of primary, general, congressional vacancy, and statewide ballot issue elections" and to "enforce the provisions of [the election] code." C.R.S. § 1-1-107(1). When a dispute regarding the application and enforcement of the Election Code arises, C.R.S. § 1-1-113 is implicated. This statute provides in part:

> (1) When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

CR.S. § 1-1-113 is the "exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election." C.R.S. § 1-1-113(4). After the filing of a "verified petition" by a registered elector and "notice to the official which includes an opportunity to be heard," if a court finds good cause to believe that the election official "has committed or is about to commit a breach or neglect of duty or other wrongful act," it "shall issue an order requiring substantial compliance with the provisions of [the Election Code]." C.R.S. § 1-1-113(1).

C.R.S. § 1-4-1204 was added to the Election Code in 2016. Section 1-4-1204(1) provides that "[n]ot later than sixty days before the presidential primary election, the secretary of state shall certify the names and party affiliations of the candidates to be placed on any presidential primary election ballots." Each candidate must be:

> seeking the nomination for president of a political party as a bona fide candidate for president of the United States pursuant to political party rules and [must be] affiliated with a major political party that received at least twenty percent of the votes cast by eligible electors in Colorado at the last presidential election.

C.R.S. § 1-4-1204(1)(b). Section 1-4-1204(4) expressly incorporates section 1-1-113 for "any challenge to the listing of any candidate on the presidential primary election ballot." Such challenges "must be . . . filed with the district court in accordance with section 1-1-113(1)." C.R.S. § 1-4-1204(4). "Any such challenge must provide notice in a summary manner of an alleged impropriety that gives rise to the complaint." C.R.S. § 1-4-1204(4).

IV. LEGAL ANALYSIS

A. Trump Procedural Motion to Dismiss

Intervenor Trump makes the following arguments in the Trump Procedural Motion to Dismiss: (1) Petitioners cannot litigate a constitutional claim in a C.R.S. § 1-1-113 proceeding; (2) under the plain language of C.R.S. § 1-4-1204, Petitioners cannot properly state a claim; (3) Petitioners don't have standing to seek relief under the Fourteenth Amendment in their claim for declaratory relief.

The Petitioners dismissed their claim for declaratory relief, so Intervenor Trump's third argument is moot.

1. Litigating a Constitutional Claim in a C.R.S. § 1-1-113 Proceeding

Intervenor Trump argues this Court must dismiss this proceeding because C.R.S. § 1-1-113 proceedings are limited to addressing wrongful acts under the Colorado Election Code and this case is about whether Intervenor Trump is disqualified under the Fourteenth Amendment's disqualification clause. In support of that argument, Intervenor Trump cites *Frazier v. Williams*, 401 P.3d 541, 547 (Colo. 2017). There, a candidate for the Republican primary ballot for the U.S. Senate initiated a C.R.S. § 1-1-113 proceeding after then-Secretary Williams determined he had not gathered sufficient signatures to appear on the ballot. *Id.* at 542-43. He simultaneously brought a 42 U.S.C. § 1983 claim arguing that Colorado statutes that prevented non-residents from collecting signatures violated the First Amendment. *Id.* at 543. The Colorado Supreme Court dismissed the 42 U.S.C. § 1983 claim, holding that the language of C.R.S. § 1-1-113 limits the claims that can be brought thereunder to "those alleging a breach or neglect of

duty or other wrongful act under the Colorado Election Code." *Id.* In rejecting Frazier's argument that the statute's reference to "other wrongful act[s]" expanded the scope of the provision to include claims such as those brought pursuant to section 1983, the Supreme Court noted: (1) such a myopic reading is disconnected from the context of the statute (*i.e.* when the statute references "other wrongful act[s]," it is referring to other wrongful acts under the Election Code); (2) C.R.S. § 1-1-113 provides for only one remedy: an order compelling substantial compliance with the Election Code, which is incompatible with the relief requested under the section 1983 claim; and (3) further inconsistencies between C.R.S. § 1-1-113, such as the limitation on appellate review and the limitation on proper plaintiffs under C.R.S. § 1-1-113, directly conflict with the provisions of section 1983, and such a reading would cause C.R.S. § 1-1-113 to conflict with the Supremacy Clause by allowing a state law to circumscribe the scope of a section 1983 claim. *Id.* at 544-47. Intervenor Trump also cites to *Kuhn v. Williams*, 418 P.3d 478, 489 (Colo. 2018), which relied on *Frazier* in holding, in cursory fashion, that it lacked jurisdiction to consider any constitutional challenge to the residency requirement for petition circulators under C.R.S. § 1-4-905(1) in a C.R.S. § 1-1-113 challenge.

The Petitioners respond that *Frazier* stands for the proposition that a party may not inject into an expedited proceeding a First Amendment challenge to the Election Code and that here, Petitioners are properly using the C.R.S. § 1-1-113 procedure to ask the Court to enjoin Secretary Griswold from violating the Election Code by putting an unqualified candidate on the ballot. In support of the argument that Secretary Griswold may only put constitutionally eligible candidates on the ballot, Petitioners cite *Hassan v.*

Colorado, 495 F.App'x. 947, 948 (10th Cir. 2012) which held that then-Secretary Gessler was correct in excluding a constitutionally ineligible candidate and that "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office."

First, the Court holds that *Frazier* and *Kuhn* are not controlling in the circumstance where the constitutional issue is not a separate claim. Both of those cases addressed whether the petitioner could bring a separate claim challenging the constitutionality of the Election Code in a C.R.S. § 1-1-113 proceeding. *See Frazier*, 401 P.3d at 543; *Kuhn*, 418 P.3d at 489. Petitioners have asserted no such claim in this case. While the Court agrees with Intervenor Trump that Petitioners' claim relies heavily on the Fourteenth Amendment of United States Constitution, Intervenor Trump does not cite any case law that suggests that a C.R.S. § 1-1-113 claim cannot have constitutional implications. Finally, as the Petitioners point out, the Tenth Circuit in *Hassan*, in an opinion written by now United States Supreme Court Justice Gorsuch, held "a state's legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." 495 F.App'x. at 948, citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193-95 (1986) (affirming exclusion of candidate from ballot under state law based on compelling state interest in protecting integrity and stability of political process) and *Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("Moreover,

a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.").

Further, to the extent that the Election Code requires the Secretary of State to exclude constitutionally unqualified candidates (which the Court is not holding), the Court holds that a C.R.S. § 1-1-113 proceeding would be the correct (and, indeed, only) procedure to do so. *See* C.R.S. § 1-1-113(4) (describing such proceedings as "the exclusive method for the adjudication of controversies" arising from an election official's neglect of duty). Any attempt to keep a candidate off the ballot is necessarily going to be expedited, and C.R.S. § 1-1-113 is the mechanism available to get a timely ruling with a direct appeal to the Colorado Supreme Court should that Court feel the issue needs its intervention.

Intervenor Trump next argues that "Petitioners seek to use Section 113 against a private citizen, to terminate his run as a candidate, without basic, well-established protections required by due process."[1] Motion, p. 7. To the extent that Intervenor Trump is arguing that the claim, though brought against the Secretary of State, is nonetheless directed at him and therefore improper, this argument would apply to any C.R.S. § 1-1-113 claim that charges a candidate should be excluded from the ballot. To hold that such a claim is improper would be to undermine the explicit legislative intent

[1] Intervenor Trump seems to take the position that Petitioners' C.R.S. § 1-1-113 claim is directed against him, personally. *See* Motion, p. 7 ("Petitioners cannot use Section 113 procedures against a private individual, like President Trump. Section 113 is expressly limited to bringing claims against *Colorado election officials*, not private individuals or potential candidates.") (emphasis in original). As a matter of procedural record, this is simply incorrect: Petitioners' C.R.S. § 1-1-113 claim is directed at the Secretary of State, not Intervenor Trump.

that C.R.S. § 1-1-113 serve as the exclusive vehicle to resolve such questions prior to an election, as it would create an exception which swallows the rule.

To the extent that Intervenor Trump is challenging the constitutionality of C.R.S. § 1-1-113 under the Due Process clause as a defense to Petitioners' claims, the Court lacks the jurisdiction to consider such a challenge. *See Kuhn*, 418 P.3d at 489 (rejecting challenge to the constitutionality of the circulator residency requirement asserted as a defense in an intervenor's response to the initial petition based on lack of jurisdiction). To be clear, the Colorado Supreme Court has held that challenges to the constitutionality of the Election Code are beyond the contemplated scope of C.R.S. § 1-1-113 challenges, which entertain only one type of claim (those for violations of the Election Code by election officials) and one type of relief (an order compelling obedience to the Election Code).

In short, Petitioners' C.R.S. § 1-1-113 claim is brought against the Secretary of State based on her alleged dereliction of her duty under the Election Code to only certify qualified candidates to the ballot. C.R.S. § 1-1-113 is the exclusive vehicle for such challenges. And while the question of whether the Secretary of State has neglected her duties in this case requires resolution of constitutional questions, it remains a challenge against an election official based on her alleged duties under the Election Code. *Frazier* has made clear that a Court cannot consider independent claims in a C.R.S. § 1-1-113 proceeding based on a violation of constitutional rights, but such cases do not stand for the proposition that a petitioner cannot seek to compel compliance with the Election Code to the extent that the Code itself requires that an election official verify

constitutional qualifications for office. The Court holds that such a claim is proper under C.R.S. § 1-1-113 as a matter of procedure.

2. Whether Petitioner's Claim Is Within the Scope of C.R.S. § 1-4-1204

As to C.R.S. § 1-4-1204, Intervenor Trump first argues that Petitioners cannot bring this claim because Secretary Griswold has not yet certified any candidates to the ballot and as a result there is no claim or controversy under C.R.S. § 1-4-1204. Intervenor Trump points to the language in C.R.S. **§** 1-4-1204(4) that provides for challenges to the "listing" of any candidate on the presidential primary ballot, arguing that he has not yet been "listed" by the Secretary of State. *See* Motion, pp. 11-12.[2]

The Petitioners respond that Intervenor Trump's argument fails because C.R.S. § 1-4-1204(4) incorporates C.R.S. § 1-1-113 as an enforcement mechanism, and that Secretary Griswold is "about to commit" an "impropriety" or "wrongful act." Further, C.R.S. § 1-4-1204(4) requires that a "challenge to the listing of any candidate" be made "no later than five days *after the filing deadline for candidates*" (emphasis added). The Secretary of State is not required to certify the primary ballot until sixty days prior to the primary, whereas candidates must file their statements of intent no later than eighty-five days prior to the primary election. C.R.S. § 1-4-1204(1), (1)(c). Conceivably, then, the Secretary of State could certify the primary ballot more than five days after the candidates' filing deadline. Under Intervenor Trump's proffered interpretation of the

[2] Intervenor Trump also argued in his Motion that before there can be a claim or controversy, he would have to be a candidate and that won't happen until he files his Major Party Candidate Statement of Intent. Because Intervenor Trump filed his Major Party Candidate Statement of Intent on October 11, 2023, this issue is now moot.

statute, a candidate's listing could not be challenged where the Secretary of State fails to certify the ballot list weeks in advance of the statutory mandate. Such an interpretation is untenable as it would lead to an absurd result, and the Court therefore affords C.R.S. § 1-4-1204(4) a more reasonable construction which allows challenges to primary ballots in advance of the Secretary's official certification under the appropriate circumstances.

As described above, C.R.S. § 1-4-1204 expressly incorporates C.R.S. § 1-1-113, and C.R.S. § 1-1-113 does not limit challenges to acts that have already occurred, but rather provides for relief when the Secretary is "about to" take an improper or wrongful act. The Petitioners have alleged that the Secretary is "about to" take an unlawful act because she has publicly stated that she will not exclude Intervenor Trump. This is consistent with public statements that the Secretary welcomes the Court's direction as well as her Omnibus Response to Motions to Dismiss.

Based on the clear language of the statute, the fact that Intervenor Trump has submitted his Major Party Candidate Statement of Intent, and Secretary Griswold's statements both in public and in this litigation, the Court holds that this matter is ripe for decision under C.R.S. § 1-4-1204.

3. Whether an Elector Can Make a Fourteenth Amendment Challenge Under C.R.S. § 1-4-1204

Intervenor Trump argues C.R.S. § 1-4-1204 sets forth three criteria for inclusion on the presidential primary ballot and that this Court cannot consider a challenge based on anything but those three criteria. The criteria are: (1) the candidate is seeking nomination as a *bona fide* candidate pursuant to the political party's rules; (2) the candidate's political party received at least 20% of the votes in the last presidential

election; and (3) the candidate has submitted a notarized Major Candidate's Statement of Intent along with a filling fee or petition. Intervenor Trump argues that the first criterion is something the Party decides, not the Secretary of State; the second criterion is an objective fact based on the prior election; and the third criterion is whether the candidate has filled out a form. Intervenor Trump points out the Major Candidate's Statement of Intent form requires a candidate to affirm he or she meets the qualifications set forth in Article II of the U.S. Constitution—it says nothing about the Fourteenth Amendment.

Petitioners argue C.R.S. § 1-4-1204 must be read in conjunction with the other provisions in the Election Code. For instance, C.R.S. § 1-4-1201 provides that all of part 12 must "conform to the requirements of federal law" which includes the United States Constitution. C.R.S. § 1-4-1203(2)(a) provides that political parties may participate in a presidential primary only if the party has a "qualified candidate." C.R.S. § 1-4-1203(3) provides the Secretary has "the same powers and shall perform the same duties for presidential primary elections as they provide by law for other primary elections and general elections." Petitioners argue that in all "other primary and general elections" only candidates who meet all the qualifications to hold office may access the ballot. Further, they point out that the text of C.R.S. § 1-4-1204(4) is broad in that it provides for "[*a*]*ny challenge to the listing* of any candidate" (emphasis added) and directs that the district court shall assess the validity of **"***all alleged improprieties*" (emphasis added). Finally, Petitioners point to the Supremacy Clause in Article VI of the U.S. Constitution that "'charges state courts with a coordinate responsibility to enforce

[federal] law according to their regular modes of procedure,' unless Congress dictates otherwise." *Consumer Crusade, Inc. v. Affordable Health Care Sol., Inc.*, 121 P.3d 350, 353 (Colo. App. 2005) (quoting *Howlett v. Rose*, 496 U.S. 356, 367 (1990)) (internal citation omitted). This, Petitioners argue, means that Part 12 of the Election Code must necessarily encompass challenges under the Fourteenth Amendment. Consequently, argue Petitioners, a challenge under C.R.S. § 1-4-1204(4) may be predicated on grounds beyond simply those enumerated in subsections (1)(b)-(c).

The Court agrees with Petitioners' interpretation of C.R.S. § 1-4-1204(4). Nothing in the language of that subsection suggests a legislative intent to limit the scope of challenges thereunder to those arising from C.R.S. § 1-4-1204. Had the legislature intended such a result, it could have limited challenges brought pursuant to subsection (4) to "any challenge under this section." The Court will not read additional language into the statute to limit its scope.

Intervenor Trump in his Motion argues the "General Assembly did not charge either the Secretary or the Petitioners with the authority to investigate or presumably enforce Section 3 of the Fourteenth Amendment." Motion, p. 14. In the Court's view, this is a pivotal issue and one best reserved for trial. In addressing Petitioners' contention that their C.R.S. § 1-1-113 proceeding here is no different than enforcing the disqualification of an underage or alien presidential candidate, Intervenor Trump argues that the Secretary of State's only role in assessing candidate qualifications is "to verify that the candidate made the appropriate affirmation" in their statement of intent.

Reply, pp. 8-9. In other words, the Secretary's role is to make sure the boxes are checked.

Intervenor Trump argues that, in *Hassan*, the reason Mr. Hassan was not allowed on the ballot is not because Secretary Gessler had authority to investigate Mr. Hassan's constitutional qualifications but because Mr. Hassan did not self-affirm he was a natural born citizen in his Statement of Intent. But that does not answer the question of whether an elector could have challenged his inclusion on the ballot had he claimed he was a natural born citizen when he wasn't, and the argument makes the mistake of assuming that because the *Hassan* court found that the Secretary of State had the authority to do one thing, it meant he had the authority to do *only* that thing. Further, the Court knows that the Secretary does, at least in some instances, exclude candidates based on constitutional deficiencies. The Court does not know how often or under what bases. These are issues that should be addressed at trial.

To be clear, the Court is not affirmatively holding the Fourteenth Amendment can be used to exclude a presidential candidate from the primary ballot, or that the Secretary of State is empowered to evaluate such a question. The Court is merely holding that it is unable to conclude as a matter of law that to the extent the Fourteenth Amendment applies to prevent ballot access for a Presidential primary candidate, the Secretary of State has no authority to investigate and exclude a candidate on that basis.

B. CRSCC Motion to Dismiss

CRSCC, in its motion to dismiss, argues this lawsuit is an infringement of CRSCC's first amendment and statutory rights because the Republican Party, not the

Secretary, under C.R.S. § 1-4-1204(1)(b) determines whether a candidate is "a bona fide candidate for president . . . pursuant to political party rules." The gist of the argument is that the Secretary has no discretion under the Election Code and that all her duties are purely ministerial. Further, because it is CRSCC who chooses its candidate, if the Secretary were to screen for qualifications under the Fourteenth Amendment that would abridge CRSCC's free speech rights.

CRSCC cites *People ex rel. Hodges v. McGaffey,* 46 P. 930, 931 (Colo. 1896) for the proposition that the Secretary has no discretion to keep a candidate off the ballot because it would deprive a party of the right to select a candidate of their choice. The Court holds that *Hodges* is inapposite. There, two factions of the Republican party both submitted nominations with the Secretary, and the Secretary only included one of the two submitted candidates on the ballot. The Colorado Supreme Court, under a prior Election Code, held the Secretary did not have the discretion to choose between the two factions. There was no discussion whatsoever regarding whether the two candidates were qualified to run for election.

CRSCC spends much of its motion arguing that C.R.S. § 1-4-1204 vests CRSCC with the authority to determine whether a candidate is a *bona fide* candidate under the political party rules. The statute is clear on that point. That, however, does not necessarily translate that if a political party decides to put forth a constitutionally unqualified candidate, then the Secretary has no discretion to exclude that candidate from the ballot. As an example, it is not clear to the Court that should CRSCC put forth a candidate that was not a natural born citizen, then the Secretary is compelled to place

the candidate on the ballot despite knowing the candidate is not qualified. In other words, taking CRSCC's argument to its logical conclusion, if the Party, without any oversight, can choose its preferred candidate, then it could theoretically nominate anyone regardless of their age, citizenship, residency, *et cetera*. Such an interpretation is absurd; the Constitution and its requirements for eligibility are not suggestions, left to the political parties to determine at their sole discretion. The more logical interpretation is that CRSCC can put forth any candidate it wants as *bona fide* pursuant to their own rules, but the Secretary will only put candidates that meet the constitutional and statutory qualifications to be on the ballot. The interests, in other words, are separate, and the Secretary of State's determination as to a candidate's constitutional eligibility does not infringe on the CRSCC's determination pursuant to C.R.S. § 1-4-1204(1)(b) that a candidate is "a bona fide candidate . . . pursuant to political party rules."

Further, the United States Supreme Court has made it clear that a Party's right to put a candidate on the ballot is not unfettered. *See*, *e.g.*, *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 364 (1997). Here, Colorado's "legitimate interest in protecting the integrity and practical functioning of the political process permits it to exclude from the ballot candidates who are constitutionally prohibited from assuming office." *Hassan*, 495 F.App'x at 948.

The Court has already found that the State's interest in assessing the constitutional qualifications of candidates which appear on its ballot does not infringe on the political parties' interest in establishing internal rules and assessing their

candidate's conformity to said rules, but to the extent such interests do overlap, the State's interest clearly predominates. It would be counterintuitive to suggest that the State's interest in preserving the integrity and stability of the electoral process, as well as its interest in discharging its constitutional obligation to enforce federal law, is subordinate to the vicissitudes of party politics. It is the United States Constitution which is the supreme law of the land, not internal political party rules.

Characterizations of the selection of ineligible candidates as a matter of "political choice" are unavailing; a citizen (or group of citizens, for that matter) cannot exempt themselves from the application of the law because they believe, as a matter of "political expression," that there has been no violation. They may, of course, still argue, profess, maintain, and campaign on the belief that there has been no violation of the law, but the freedom to do so does not exempt them from the application of the law any more than a tax protestor's belief that taxation is theft exempts them from paying taxes.

The Court stresses that it is considering these questions in the abstract, in the context of motions to dismiss. The Court makes no judgments on the merits of Intervenor Trump's constitutional fitness as a candidate by way of these rulings. The question which the Court considers here is, again, *if* a political party puts forth a constitutionally ineligible candidate, and *if* the Secretary of State has the legal authority to vet candidate fitness, does it violate the First Amendment for the State to disqualify that candidate on the grounds of his ineligibility? The CRSCC maintains that it does; the Court holds that it does not. To find otherwise would be to permit the political

parties to disregard the requirements of the law and the constitution whenever they decided as a matter of "political expression" or "political choice" that they did not apply.

C. CRSCC Motion for Judgment

In this motion, CRSCC moves this Court to affirmatively grant the relief sought by CRSCC in its Verified Petition as against the Secretary of State. The CRSCC, essentially, seeks a declaration from this Court that:

> an act by the Respondent Secretary of State barring from the ballot a presidential candidate designated by a major political party as qualified, and in the absence of proper disqualification pursuant to the processes Congress has established and otherwise qualified under § 1204 and federal election law, is ultra vires and in violation of [CRSCC's] First Amendment and statutory rights – even if such an act is not ordered by the Court or the Petitioners case is dismissed.

Motion, p. 2. CRSCC seeks this relief through a motion for judgment on the pleadings or, alternatively, through C.R.C.P. 56(h), to the extent the Court's ruling on the issue presented is not dispositive.

Petitioners respond that CRSCC's motion is premature and procedurally improper because motions under C.R.C.P. 12(c) and 56(h) are not permitted until after the pleadings are closed. The Court agrees. Both rules grant leave to file such motions only "[a]fter the pleadings are closed"; or "[a]t any time after the last required pleading" C.R.C.P. 12(c); 56(h). Here, there are multiple pending motions to dismiss. The motion, therefore, is premature, and the Court goes no further.

D. Petitioners' Motion to Dismiss

Petitioners move to dismiss CRSCC's first claim under Rule 12(b)(1). CRSCC seeks "a Declaration pursuant to Colo. R. Civ. P. 57 and C.R.S. § 13-51-105 that

Petitioner [sic] requested relief violates Intervenor's First Amendment rights under the U.S. Constitution and therefore must be denied." Petition, p. 8. Petitioners argue that because this claim does not arise under the Election Code, the Court lacks subject matter jurisdiction to hear it in this expedited election proceeding. Petitioners characterize the claim as "implying that *any* exclusion of an ineligible candidate from the ballot would violate Intervenor's constitutional rights." Motion, p. 3 (emphasis in original).

CRSCC agrees that constitutional issues are indeed not redressable "in the context of proceedings under C.R.S. § 1-1-113(1) and § 1-4-1204(4)," which is why it brings its claim pursuant to C.R.C.P. 57 and C.R.S. § 13-51-101 *et seq*. Response, p. 3. CRSCC asserts that it is not attacking the constitutionality of the code but instead is arguing that the relief Petitioners request would violate the First Amendment and therefore is unavailable to Petitioners.

In its holding that *Frazier* and *Kuhn* are controlling, the Court distinguished between a C.R.S. § 1-1-113 proceeding which could have constitutional implications and an independent constitutional claim brought in a C.R.S. § 1-1-113 proceeding. CRSCC's First Claim seeks a declaration that it would be unconstitutional for the Secretary of State to disqualify Intervenor Trump because of their protected interests in speech and association. *Frazier* and its progeny are clear that C.R.S. § 1-1-113 proceedings are limited in scope and may only consider claims of breach or neglect of duty or other wrongful act under the Colorado Election Code. *See Kuhn*, 418 P.3d at 489. To the extent the CRSCC's First Claim asserts an independent constitutional claim, the Court is

without jurisdiction to consider it. In the Court's view, CRSCC's First Claim does just that. The only relief this Court can afford in a C.R.S. § 1-1-113 proceeding is an order to comply with the Election Code. Thus, a claim that such relief is unconstitutional is no more than a claim that the Election Code is unconstitutional.

To the extent that the relief requested is not available under the Election Code, it cannot (and will not) be ordered by this Court, and the declaration would be moot. To the extent CRSCC fears that the Secretary of State will disqualify Intervenor Trump from the ballot in the absence of an order from the courts and seeks a declaration that doing so would violate their First Amendment rights, such a claim arises from outside the Election Code and may not be considered by this Court in this proceeding. As the *Frazier* court emphasized, "Colorado courts remain entirely open for the adjudication of section 1983 claims, including on an expedited basis if a preliminary injunction is sought." 401 P.3d at 542. The Court therefore GRANTS Petitioners' motion to dismiss and dismisses CRSCC's First Claim.

V. CONCLUSION

For all the reasons stated above, the Court DENIES Donald J. Trump's Motion to Dismiss filed September 22, 2023, DENIES CRSCC's Motion to Dismiss Pursuant to Colorado Rule of Civil Procedure 12(b)(5), GRANTS Petitioners' Motion to Dismiss Intervenor's First Claim for Relief under C.R.C.P. 12(b)(1), and DENIES CRSCC's Motion for Judgment on the Pleadings Under Rule 12/Judgment as a Matter of Law Under Rule 56. The Court will address Intervenor Trump's 14th Amendment Motion to Dismiss under separate cover.

DATED: October 20, 2023.

BY THE COURT:

Sarah B. Wallace
District Court Judge

DATE FILED: December 8, 2016 3:53 PM
FILING ID: C8E2632C1557D
CASE NUMBER: 2016SA230

SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
District Court, City and County of Denver, Case No. 2016CV31574 Hon. Elizabeth Starrs, District Court Judge	
IN RE: RYAN FRAZIER, Plaintiff, v. WAYNE W. WILLIAMS, in his official capacity as Colorado Secretary of State, Defendant.	▲ **COURT USE ONLY** ▲
CYNTHIA H. COFFMAN, Attorney General FREDERICK R. YARGER, Solicitor General LEEANN MORRILL, First Assistant Attorney General* MATTHEW D. GROVE, Assistant Solicitor General* CHRISTOPHER M. JACKSON, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: 720 508-6157 FAX: 720 508-6104 E-Mail: matt.grove@coag.gov Registration Nos: 38742, 34269, 49202 *Counsel of Record	Case No. 16SA_____

PETITION FOR RULE TO SHOW CAUSE PURSUANT TO C.A.R. 21

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 21 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief contains 5,236 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 21 and C.A.R. 32.

/s/ *Matthew D. Grove*
MATTHEW D. GROVE, 34269*
Assistant Solicitor General

Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Pursuant to Colorado Appellate Rule 21, Article VI, Section 2 of the Colorado Constitution, and § 1-1-113(3), C.R.S. (2015), Wayne Williams, in his official capacity as Colorado Secretary of State ("the Secretary") and through counsel, petitions this Court to issue a rule to show cause why the district court's order that Proposed Respondent Ryan Frazier is entitled to an award of attorney fees should not be reversed.

INTRODUCTION

The Secretary seeks review—via either C.A.R. 21 or § 1-1-113(3), C.R.S.—of the district court's conclusion that it had jurisdiction to entertain a federal claim asserted by proposed Respondent Ryan Frazier, and that Frazier is now eligible for an award of attorney fees pursuant to 42 U.S.C. § 1988. Frazier was a candidate for U.S. Senate who, through a petition under § 1-1-113, C.R.S. (2015), challenged the Secretary's determination that he had not collected enough valid signatures to qualify for the Republican primary ballot. (**Exhibit A**). The district court initially ruled that Frazier had not submitted enough substantially compliant signatures. (**Exhibit B**). Frazier appealed to

this Court, which took jurisdiction and found that a number of other signatures satisfied the substantial compliance standard. *See Frazier v. Williams*, 16SA159 (Colo. May 24, 2016) (**Exhibit C**). After these signatures were included in the count on remand, the district court ruled that Frazier had "shown by a preponderance of the evidence that he has a sufficient number of signatures which substantially comply" with the requirements of Colorado's Election Code, and declared that "Mr. Frazier qualifies to be on the Republican primary ballot for U.S. Senator." (**Exhibit D**). While Frazier raised several federal constitutional challenges to Colorado's statutory and constitutional requirements for petition circulators under 42 U.S.C. § 1983, neither the district court nor this Court ruled on the merits of those claims.

The ballot access phase of this case is finished. Frazier won his challenge on state law grounds and appeared on the primary ballot. What remains is the question that has dogged candidates, election officials, and the courts for many years: Can a party append federal issues to state-law claims in a § 1-1-113 proceeding?

The Secretary acknowledges that this petition is procedurally unusual. But the question that it presents goes to the heart of election administration and has not proven amenable to resolution through the appellate procedures contemplated by § 1-1-113. He therefore respectfully requests that this Court accept jurisdiction over his petition pursuant to C.A.R. 21 or § 1-1-113(3), C.R.S.

A. Identity of the parties.

Petitioner is Colorado Secretary of State Wayne Williams, the defendant below.

- **Counsel for Petitioner:**

  LeeAnn Morrill, No. 38742; leeann.morrill@coag.gov
  Matthew Grove, No. 34269; matt.grove@coag.gov
  Christopher Jackson, No. 49202; chistopher.jackson@coag.gov
  Colorado Department of Law
  1300 Broadway
  Denver, CO 80203
  Phone: (720) 508-6157
  Fax: (720) 508-6041

The proposed Respondent is Ryan Frazier, the plaintiff below.

- **Counsel for proposed Respondent:**

  Scott Gessler, No. 28944; sgessler@klendagesslerblue.com
  Geoffrey Blue, No. 32684; gblue@klendagesslerblue.com
  Klenda Gessler & Blue, LLC

1624 Market St., Suite 202
Denver, Colorado 80202
Phone: (720) 839-6637

B. Identity of the court below.

The court below is the District Court for the Second Judicial District, the Honorable Elizabeth Starrs presiding.

C. Identity of the persons against whom relief is sought.

The Secretary seeks relief against the Proposed Respondent.

D. Ruling complained of and relief sought.

The Secretary seeks relief from the district court's August 3, 2016 order (**Exhibit E**) declaring that Frazier was entitled to recover attorney fees under 42 U.S.C. § 1988, and thus confirming that federal claims asserted under 42 U.S.C. § 1983 may appropriately be combined with a § 1-1-113 challenge arising under Colorado's Election Code. The Secretary requests that this Court vacate the district court's order and clarify that challenges brought under § 1-1-113 must be rooted exclusively in alleged violations of Colorado's Election Code.

E. Reasons why no other adequate remedy is available

This Court's exercise of original jurisdiction is discretionary and it determines whether to exercise that discretion by examining the particular circumstances of each case. *City & Cty. of Denver v. Dist. Court*, 939 P. 2d 1353, 1360-61 (Colo. 1997). C.A.R. 21 authorizes the Court to exercise its original jurisdiction to review a trial court's order if a remedy on appeal would be inadequate. *Ortega v. Colo. Permanente Med. Group, P.C.*, 265 P.3d 444, 447 (Colo. 2011) (citing *Cardenas v. Jerath*, 180 P.3d 415, 420 (Colo. 2008)).

Here, there are at least four reasons to conclude that no other adequate appellate remedies exist. ***First*,** § 1-1-113 creates a specialized procedure for resolving election disputes. It provides that "[t]he proceedings [of the district court] may be reviewed and finally adjudicated by the supreme court of this state, if either party makes application to the supreme court within three days after the district court proceedings are terminated." § 1-1-113(3); *see also* § 13-4-102(1)(g), C.R.S. (2015) (providing for exclusive Supreme Court jurisdiction over appeals from "summary proceedings initiated" under

the Election Code). And while the Court of Appeals has considered issues similar to the one presented in this case on two previous occasions, this Court has yet to confirm whether or not an intermediate appellate court's exercise of appellate jurisdiction in a § 1-1-113 proceeding is appropriate. *See Brown v. Davidson*, 192 P.3d 415 (Colo. App. 2006) (holding that a § 1983 claim may be asserted as part of a § 1-1-113 proceeding; no petition for certiorari filed); *Colo. Libertarian Party v. Williams*, 2016 COA 5 (same; petition for writ of certiorari pending).

***Second*,** as a practical matter, it is unclear under § 1-1-113(3) when "the district court proceedings are terminated." This Court's exercise of jurisdiction several months ago suggests that the district court proceedings were "terminated" at that point, but the questions presented in this appeal went unaddressed by the district court until last week. As a consequence, it is unclear whether the district court has—or will ever—issue an order that can be appealed to the Court of Appeals. And even assuming that the seemingly exclusive appellate remedy in § 1-1-113 does not apply, any attempt by the Secretary to

reach a monetary settlement on the attorney fee issue would have the potential to moot the issues presented here.

Third, the sheer swiftness of summary trials and appeals brought under § 1-1-113 has proven to be an impediment to full consideration of the appropriate scope of those proceedings. In this case, for example, the Secretary has objected at every stage to the merger of state-law claims brought under § 1-1-113 with federal constitutional claims asserted under 42 U.S.C. § 1983. Despite those objections, neither the district court nor this Court directly addressed the issue during the ballot access phase of the case. Indeed, no court considered the Secretary's arguments at all until now, well after the state-law claims have been decided and—assuming that joinder of the two types of claims was appropriate in the first place—prevailing-party status is a foregone conclusion. While the time pressures associated with election-related challenges perhaps make this flaw in the system unavoidable, they also make standard appellate resolution a virtual impossibility.

Finally, the need for this Court to definitively assess the appropriate scope of § 1-1-113 proceedings becomes more pressing with

each passing election. If, as the Secretary contends, § 1-1-113(1), C.R.S. (2015), only empowers district courts to "issue an order requiring substantial compliance with the provisions of [the Election Code]," and not to rule on substantive federal constitutional questions, then cases such as this one present jurisdictional problems that have thus far evaded this Court's review. Normal appellate remedies have proven inadequate for resolving this issue, and with a presidential election fast approaching, there is an urgent need to determine the appropriate scope of § 1-1-113 proceedings.

F. Issues presented.

1) Does the neutral jurisdictional rule established by § 1-1-113(1) contemplate the joinder of federal claims with state-law claims arising under Colorado's Election Code?[1]

---

[1]Whether a federal constitutional claim may be asserted as part of a § 1-1-113 proceeding is a recurring question that, in addition to arising here, is currently pending on writ of certiorari before this Court. *See Libertarian Party of Colo. v. Williams*, 2016 COA 5, *writ of certiorari pending*, Case No. 16SC145. The Secretary submits that if the Court accepts jurisdiction over this petition, judicial efficiency would be enhanced by the consolidation of this case with *Libertarian Party*.

2) Assuming that § 1-1-113 does not prohibit the joinder of federal and state-law claims, is an award of attorney fees under 42 U.S.C. § 1988 in this case unjust?

G. Facts necessary to understand the issue presented.

The Colorado Secretary of State is Colorado's chief elections official. In that role he is responsible for "supervis[ing] the conduct of primary, general, congressional vacancy, and statewide ballot issue elections in this state." § 1-1-107(1)(a), C.R.S (2015). This is a wide-ranging responsibility, covering everything from ballot access to election day procedures to recounts.

Elections—and problems with election administration—evolve rapidly and, due to impending and immutable deadlines, frequently demand rapid judicial resolution. The General Assembly has anticipated this; Colorado's Election Code establishes several types of short-fuse procedures that are designed for swift and final resolution of both pre- and post-election disputes.

This case began as a ballot access challenge filed under one of those special statutory procedures: § 1-1-113. Frazier was a candidate

for the Republican Party nomination for U.S. Senate who opted to petition onto the ballot. He submitted signatures supporting his nomination to the Secretary just before the statutory deadline. After applying the standards for signature verification outlined by state statute and administrative rule, the Secretary declared that Frazier had failed to collect enough valid signatures in four congressional districts, and issued a statement of insufficiency.

Frazier filed a petition for review of the Secretary's determination of insufficiency pursuant to § 1-4-909(1.5), C.R.S. (2015) and § 1-1-113. He argued that many of the signatures that the Secretary rejected substantially complied with the requirements of the Election Code and, in addition, asserted that several of the statutory requirements applicable to petition circulators violate the First Amendment, and are thus unenforceable.

The district court commenced an evidentiary hearing the next morning, and issued a final order just two days after the petition was filed. Applying the standard for judicial review authorized by § 1-1-103(3), C.R.S. (2015), the district court found that a number of petition

sections that had been disqualified for errors in their circulator's affidavit substantially complied with the Election Code, and ordered the Secretary to count them. Adding these signatures put Frazier's petition past the requisite 1,500 mark in all but the Third Congressional District ("CD 3"), where he was still 75 signatures short.

Frazier appealed to this Court three business days later pursuant to § 1-1-113(3), arguing that the district court misapplied the substantial compliance standard and that it should have ordered the Secretary to accept 100 additional signatures in CD 3. This Court accepted the case and, after briefing, issued a summary order that directed the district court to accept 49 additional signatures and reconsider the other 51. Applying the state-law substantial compliance standard, the district court ultimately accepted all 51 of these signatures and determined that Frazier qualified for the ballot.

Although Frazier asserted First Amendment claims under 42 U.S.C. § 1983 and for attorney fees under § 1988 in his § 1-1-113 petition, neither the district court nor this Court ever addressed them. The parties raised the question of an attorney fee award again following

remand, and the district court heard legal argument on that issue. On August 3, 2016, the district court ruled that Frazier's federal claims were appropriately asserted as part of his § 1-1-113 petition and that, having prevailed on his state-law claims while asserting a substantial federal claim, he was entitled to an award of attorney fees.

The Secretary then filed this C.A.R. 21 petition seeking review of the district court's order.

H. Reasons to issue a rule to show cause and grant relief.

In granting Frazier's request for an attorney fee award under 42 U.S.C. § 1988, the district court rejected the Secretary's argument that it lacked subject matter jurisdiction over Frazier's claims. This Court should hold that § 1-1-113 establishes a neutral jurisdictional rule limiting the scope of proceedings to violations of Colorado's Election Code.

1. Section 1-1-113 is designed to accommodate the rapid resolution of disputes arising under the Election Code.

Colorado law provides a specific and limited-scope procedural mechanism for challenging an election official's compliance with the Election Code. In this case, Frazier challenged the Secretary's

determination that he had not submitted enough valid signatures to qualify for the ballot. Under § 1-4-909(1.5), a candidate whose petition is deemed insufficient "may petition the district court within five days for a review of the determination pursuant to section 1-1-113."

Section 1-1-113, in turn, provides for extremely accelerated judicial review of disputes arising under Colorado's Election Code. It does so by conferring jurisdiction on Colorado's district courts to hear controversies "aris[ing] between" various aggrieved parties and "any official charged with any duty or function under [the election] code." § 1-1-113(1). District courts may hear those petitions "when any eligible elector … alleg[es] that a person charged with a duty under [the election] code has committed or is about to commit a breach of duty or other wrongful act." *Id.* The statute is "the exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of the election." § 1-1-113(3). If the district court determines that a violation has occurred or is about to occur, it must "issue an order requiring substantial

compliance with the provisions of *this code*." § 1-1-113(1) (emphasis added).

Because they require immediate resolution of pressing election administration questions, petitions filed under § 1-1-113 move forward at astonishing speed. This case is a good example. Frazier filed his petition at 2:59 p.m. on May 2, 2016. Over the course of that evening and into the early morning hours, the parties drafted and submitted trial briefs and negotiated 151 paragraphs of stipulated facts. Trial commenced the next morning at 9 a.m., 18 hours after the petition was filed. Under this timeline, discovery, dispositive motions, and other normal procedures were out of the question. Instead, the "summary proceeding," *see* § 13-4-102(1)(g), went forward with only the stipulations and any witnesses, exhibits, and argument the parties were able to muster on short notice.

This breakneck pace is an unavoidable consequence of the election calendar, which is delicately balanced between dictates of federal and Colorado law. Here, Frazier submitted his completed petitions to the Secretary just hours before the cutoff, and the Secretary's line-by-line

review was completed just one day before the ballot certification deadline. The Secretary stipulated to a stay of the certification deadline in order to permit Frazier's challenge to go forward, but federal deadlines cannot be delayed, so the stay could not last more than a few days.

The need for rapid resolution in these cases greatly constrains the ability of the parties to develop, and for district courts to accurately and reliably resolve, complex constitutional claims. It is thus unsurprising that the plain language of § 1-1-113 contemplates that proceedings brought under that statute will involve disputes arising under Colorado's Election Code, and only the Election Code. § 1-1-113(1) (granting district court authority to consider a "petition … alleging that a person charged with a duty under *this code* has committed or is about to commit a breach or neglect of duty or other wrongful act") (emphasis added). A district court's authority to remedy a violation of the Election Code is similarly limited. § 1-1-113(1) ("Upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of *this code*.") (emphasis added).

The narrowness of this statutory remedy is appropriately tailored to the purpose of § 1-1-113. The statute is not designed to allow for the full and final adjudication of parties' federal constitutional rights—and, in practice, federal claims can easily be mooted during the course of a § 1-1-113 proceeding. *See, e.g. Colo. Libertarian Party*, 2016 COA 5, ¶¶ 14-18. The statute is instead an election integrity safeguard that allows for judicial course-correction up to the day of the election. It is intended to ensure that potential violations of Colorado's Election Code can be raised and remedied before the election goes forward.

2. 42 U.S.C. § 1983 is intended to allow full adjudication of federal civil rights claims.

Section 1-1-113 and § 1983 have very different purposes and are covered by very different procedural rules. As already discussed, § 1-1-113 frequently requires full and final resolution of election claims in a matter of days. In contrast, while traditional temporary remedies such as temporary restraining orders or preliminary injunctions are available in the § 1983 context, the federal statute's focus on permanent vindication of federally secured rights means that cases filed under §

1983 are almost never permanently decided on the basis of summary proceedings without the consent of the parties.

A comparison of this case with a recent federal case on a similar topic offers a compelling example of the inequities inherent in permitting a § 1983 claim to be appended to a petition filed under § 1-1-113. In *Independence Institute v. Buescher*, the Secretary defended against a complaint asserting constitutional challenges to several statutes governing petition circulation for ballot initiatives. The claims in that litigation involved, among other things, a challenge to Colorado's residency requirement for circulators of ballot initiatives.[2] The case began with a preliminary injunction hearing in federal court, *Indep. Inst. v. Buescher*, 718 F. Supp. 2d 1257 (D. Colo. 2010), which was followed by more than a year of discovery, and culminated in a two-week bench trial. Both parties engaged in substantial amounts of discovery, including dozens of depositions, the designation of experts, and thousands of pages of document production. The docket report for

[2] The Secretary stipulated to the entry of a preliminary injunction and, after discovery, a permanent injunction on this claim based on the binding precedent of *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008).

the case contains more than 400 entries, and the litigation resulted in no fewer than three published opinions—*Buescher*, 718 F. Supp. 2d 1257, *Indep. Inst. v. Gessler,* 869 F. Supp. 2d 1289 (D. Colo. 2012), and *Indep. Inst. v. Gessler*, 936 F. Supp. 2d 1256 (D. Colo. 2013).

To be sure, the constitutional challenges in *Independence Institute* were more extensive and complex than the ones Frazier appended to his § 1-1-113 claim in this case. But that case was not atypical. Federal constitutional claims, virtually as a rule, are not subject to summary adjudication. Many federal-court challenges to circulator residency and registration requirements have moved relatively quickly, but in every case the Secretary is aware of, the state defendants have been given *some* opportunity to engage in discovery and motions practice. *See, e.g.*, *Libertarian Party of Va. v. Judd*, 718 F.3d 308 (4th Cir. 2013) ("In light of the time-sensitive nature of the dispute, the district court… direct[ed] that discovery immediately commence and be completed within thirty days"); *Yes on Term Limits, Inc. v. Savage*, 2007 U.S. Dist. LEXIS 66432 at *1 (W.D. Okla. Sept 7, 2007), *aff'd* 550 F.3d 1023 (10th Cir. 2008) (noting that two months elapsed between complaint and preliminary

injunction hearing, and that parties stipulated to consolidation of preliminary injunction with hearing on the merits). Other cases have lingered in the trial court for a year or more, during which the parties were able to conduct full discovery, develop expert and lay testimony, and submit comprehensive dispositive motions. *See, e.g.*, *Nader v. Blackwell*, 545 F.3d 459, 469-70 (6th Cir. 2008); *Chandler v. City of Arvada*, 233 F. Supp. 2d 1304, 1305 (D. Colo. 2001).

Federal constitutional challenges to state election laws are critically important, and the need for accurate resolution of these legal questions demands that the governmental defendant be provided an opportunity to develop and present its defenses. That cannot be done in the rapid-fire context of a § 1-1-113 proceeding which, in this case, left the Secretary with fewer than 24 hours to prepare his defens**e.**

3. The Court of Appeals has incorrectly held that § 1983 claims may be joined with a § 1-1-113 petition.

The Colorado Court of Appeals has twice held that § 1983 claims may be asserted in a § 1-1-113 summary proceeding. *Brown*, 192 P.3d 415; *Colo. Libertarian Party*, 2016 COA 5. And the district court

correctly concluded that it was bound by *Brown* on this question. This Court, however, has yet to address the issue.

In *Brown*, the Court of Appeals held that federal civil rights remedies are intended to be broad, and that "when a state places procedural barriers that deny or limit the remedy available under § 1983, those barriers must give way or risk being preempted." 192 P.3d at 418. In reaching this conclusion, *Brown* undertook no analysis of the statutory text of § 1-1-113, which, as discussed above, limits the scope of review to violations of Colorado's Election Code. It also failed to acknowledge an important exception to federal preemption: "[A] neutral jurisdictional rule"—like § 1-1-113—can be "a 'valid excuse' for departing from the default assumption that" state courts are obligated to hear federal claims asserted under § 1983. *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

Section 1-1-113 is a neutral jurisdictional rule that should be limited to the adjudication of questions arising under Colorado's Election Code. Among other things, the complexity of First Amendment litigation is entirely at odds with the rapid resolution required in pre-

election disputes. The lack of discovery or adequate opportunity to marshal evidence and develop legal defenses, together with quickly evolving legal claims and the absence of motions practice, all differentiate § 1-1-113 petitions from standard constitutional litigation in important procedural and substantive ways. Additionally, First Amendment litigation can result in precedent that has lasting, permanent effects on how the State may legislate in the elections arena. Section 1-1-113, which is only concerned with how existing state law should be applied in practice, is not designed for that kind of work.

Combining these two types of cases poses other procedural and substantive difficulties as well. For instance, virtually all election cases arise under the First Amendment, and in every one the state bears at least some evidentiary burden. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (holding that courts must consider the "character and magnitude" of the burden a regulation imposes on First Amendment rights and then weigh that burden against the precise interests the state contends justify it). In cases involving a severe burden—which nearly every case involving a residency or registration

requirement for petition circulators has applied—the state's evidentiary responsibility is particularly onerous. *See, e.g.*, *Yes on Term Limits*, 550 F.3d at 1028 (applying strict scrutiny and holding that the state "has the burden of proving that its [regulation] is narrowly tailored to serve a compelling state interest").

In the previous proceedings in this case, Frazier argued that strict scrutiny should apply to his constitutional claims, and emphasized that the Secretary had presented no evidence to meet the burden imposed by that standard. But in doing so, he elided a critical issue—how the Secretary could possibly have put on any evidence given that he had all of two business *hours* to prepare for trial. Deciding critical issues on a short fuse and with no opportunity to develop an evidentiary record places an intolerable burden on both district courts and governmental defendants. In short, just as "bad facts make for bad law," having no facts and no time to consider the issues likewise leads to flawed reasoning and incorrect outcomes. This problem can and should be avoided by confirming that § 1-1-113 creates a neutral jurisdictional

rule that is limited to resolution of challenges brought under Colorado's Election Code.

Nor would acknowledging the limited scope of § 1-1-113 proceeding run afoul of the Supremacy Clause. It is of course true that the Supremacy Clause in most cases requires state courts to exercise jurisdiction over federal claims, because "state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law." *Haywood*, 556 U.S. at 735. At the same time, however, "[t]he requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented." *Howlett v. Rose*, 496 U.S. 356, 372 (1990). States retain "great latitude to establish the structure and jurisdiction of their own courts," and they may "apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Id.*

Section 1-1-113 falls squarely within the narrow exceptions to the "neutral jurisdictional rule" doctrine. While states cannot employ a jurisdictional rule "to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source," *Howlett*, 496 U.S. at 371, the limited scope of § 1-1-113 does not stem from a *sub silentio* desire to nullify federal law. Colorado has not, for example, made a "judgment that [election officials] should not be burdened with suits for damages arising out of conduct performed in the scope of their employment." *Haywood*, 556 U.S. at 736. In fact, section 1-1-113 in no way bars those aggrieved by constitutional violations in the election context from filing a separate suit on those constitutional claims, whether in state or federal court. The Secretary is aware of no federal case holding that a state violates the Supremacy Clause when it merely *re-channels* a federal claim to a non-expedited process. Rather, all that § 1-1-113 does is ensure that election disputes arising under Colorado's Election Code will be decided efficiently, conclusively, and on the narrowest grounds possible.

Other jurisdictions have agreed with this approach. *See, e.g.*, *Gelb v. Bd. of Elections*, 950 F. Supp. 82, 85 (S.D.N.Y. 1996) (citing cases holding that a § 1983 claim is an improper vehicle to seek review of state action in election disputes); *Ashley v. Curtis*, 408 N.Y.S.2d 858 (1978) (suggesting that a § 1983 claim should be converted to a normal "plenary" claim when it is brought as a claim under a special statutory proceeding). The key question is whether the jurisdictional rule at issue is "used as a device to undermine federal law, no matter how evenhanded it may appear." *Haywood*, 556 U.S. at 739. But § 1-1-113 creates none of these concerns. The Colorado General Assembly did not intend that the special election procedures would provide Colorado's courts with "an excuse to avoid … federal law." *Id.* Rather, the limited scope of § 1-1-113 proceedings is based on the fact that state courts cannot develop "competence over the subject matter," particularly the extraordinarily complex subject matter in First Amendment election litigation, on such a short timeline. *Id.*

This Court should exercise jurisdiction over the Secretary's petition and consider whether § 1-1-113 limits the scope of review in

summary pre-election proceedings to claims arising under Colorado's Election Code.

4. If this Court were to conclude that § 1-1-113 does not create a neutral jurisdictional rule limiting the scope of summary pre-election cases, it should nonetheless hold that an award of attorney fees is unjust.

In the alternative, this Court should consider whether a party in Frazier's position should be entitled to an attorney fee award under 42 U.S.C. § 1988 given the special circumstances that are inherent in the rapid resolution of summary pre-election proceedings.

Section 1988 provides, "In any action or proceeding to enforce a provision of [Section 1983], the court, in its discretion, may allow the prevailing party … a reasonable attorney's fee as part of the costs …." 42 U.S.C. § 1988(b). "The aim of the section … is to enable civil rights plaintiffs to employ reasonably competent lawyers without cost to themselves if they prevail." *Venegas v. Mitchell*, 495 U.S. 82, 86 (1990). This approach is generally consistent with "Congress's intention that a party who succeeds in enforcing his or her civil rights 'should ordinarily recover an attorney's fee.'" *Id.* at 582, quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

But in the § 1-1-113 context, there are "special circumstances [that] would render such an award unjust." *Id.* When reviewing signatures, the Secretary has a different role—and considers different factors—than the courts do. The scope of the Secretary's administrative review is dictated by state statutes and administrative regulations. *See* §§ 1-4-904, -905, C.R.S. (2015); 8 C.C.R. 1505-1, Rule 15. Reviewing courts, on the other hand, are directed to "liberally construe[ ]" the Election Code and apply a "substantial compliance" standard. § 1-1-103(1), (3), C.R.S. (2015). Courts may also consider evidence unavailable to the Secretary—for example, testimony by a circulator about why the address listed on his affidavit does not match the statewide voter database—to determine whether the substantial compliance standard has been met. As the district court noted in its initial in this case, "[I]t is the court which makes the determination of 'substantial compliance,' not the SOS." Ex. B at 3.

To stake out a position on substantial compliance would in most cases be inconsistent with the Secretary's ministerial role in the signature review process and would intrude on the courts' responsibility

to act as a gatekeeper. While this approach is in keeping with the limited scope of the Secretary's statutory and constitutional responsibilities, it has the unfortunate side effect of tying the Secretary's hands. In short, *Brown* virtually guarantees an attorney-fee bootstrap to any complainant who is able to satisfy the substantial compliance standard in what often amounts to a non-adversarial proceeding. But it would be fundamentally inequitable to require the Secretary to foot the bill for litigation that is contemplated as a routine occurrence under the Election Code as a way to determine whether a candidate qualifies for the ballot, particularly when the errors that gave rise to this case were the candidate's, and not the Secretary's. "Congress intended to permit the … award of counsel fees only when a party has prevailed on the merits." *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980). Even if this Court were to accept the case and hold that Frazier's § 1983 claims were properly asserted, it should nonetheless conclude that Frazier cannot "prevail" against the Secretary in this action, at least in the traditional adversarial sense. As

a result, it should hold that this is a "special circumstance" that would render such an award "unjust."

I. List of supporting documents.

Exhibit A: Petition by Ryan Frazier Protesting Statement of Insufficiency

Exhibit B: Order re: Ryan Frazier (Denver District Court, May 4, 2016)

Exhibit C: Order of Court (Colorado Supreme Court, May 24, 2016)

Exhibit D: Order (Denver District Court, May 25, 2016)

Exhibit E: Attorney Fees Order (Denver District Court, August 3, 2016)

CONCLUSION

The Secretary respectfully requests that this Court issue an order to show cause why the district court's exercise of jurisdiction over Frazier's federal claims should not be reversed.

Respectfully submitted this 8th day of August, 2016.

CYNTHIA H. COFFMAN
Attorney General

/s/ *Matthew D. Grove*

LEEANN MORRILL, 38742*
MATTHEW D. GROVE, 34269*
CHRISTOPHER M. JACKSON, 49202*
Public Officials Unit
State Services Section
Attorneys for Respondent
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Petition for Rule to Show Cause Pursuant to C.A.R. 21 upon all parties herein by Integrated Colorado Courts E-filing System (ICCES) or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 8th day of August 2016 addressed as follows:

Scott Gessler
Geoffrey Blue
Steven Klenda
Klenda Gessler & Blue, LLC
1624 Market St., Ste. 202
Denver, CO 80202

The Honorable Elizabeth Starrs
District Court, City and County of Denver
1437 Bannock Street, Div. 259
Denver, CO 80202

/s/ *Matthew D. Grove*